IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Jose Doe, Plaintiff, vs. Jason T. Olson, Chief of Police; Minot Police Department; Sgt. Dave Goodman, in his individual and official capacities; Detective Thompson in her individual and official capacities; Detective Jesse Smith, in his individual and official capacities; Criminal Investigation Bureau, and an Unknown Number of Unknown Federal (ICE) and City Minot Agents of Law Enforcement, Defendants.	)	CIVIL NO. 4:14-cv-119 **MEMORDANUM IN SUPPORT OF MINOT DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

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Defendants Minot Police Department Sergeant Dave Goodman, in his individual and official capacities, Minot Police Department Detective Thompson in her individual and official capacities; and unknown City of Minot Agents of Law Enforcement (hereinafter "Minot Defendants") submit this memorandum in support of *Minot Defendants' Motion To Dismiss, or in the Alternative, for Summary Judgment*, filed herewith. For the reasons as set forth herein, Minot Defendants respectfully request the Court dismiss Plaintiff's Complaint against them.

II. STATEMENT OF UNDISPUTED FACTS

A. Jose Doe Is A Pseudonym

Jose Doe is not the real name of the Plaintiff in this civil action. Jose Doe is a pseudonym which this Court has not authorized the Plaintiff to utilize. Plaintiff was previously denied permission to utilize the pseudonym Jose Doe by District Judge Gary H. Lee in a nearly identical civil action entitled *Jose Doe v. Minot Police Department, et al*, Ward County District Court, State of North Dakota, Civil No. 51-2014-CV-00904. Said State Court civil action was voluntarily dismissed, without prejudice, at the request of Plaintiff prior to the filing of this present action.

B. Criminal Investigation At Issue

As the Court has not yet ruled upon the issue of whether Plaintiff may maintain this action under the pseudonym Jose Doe, and as the criminal investigation file of the Minot Police Department and North Dakota Bureau of Criminal Investigation pertaining to the Plaintiff's claim in this action discloses the Plaintiff's identity, the portions of the criminal investigation files relied upon by the Minot Defendants have been filed under seal with the Court.

As a preliminary matter, it should be noted the facts stated below do not contradict the facts as alleged by the Plaintiff in his complaint, and are also derived from official government records. Such facts may be considered by this Court in the context of the Minot Defendants' Rule 12(b)(6) motion to dismiss, as well as the Minot Defendants' alternative Rule 56 motion for summary judgment.

> In this circuit, Rule 12(b)(6) motions are not automatically converted into motions for summary judgment simply because one party submits additional matters in support of or in opposition to the motion. *See Martin v. Sargent*, 780 F.2d 1334, 1336-37 (8th Cir. 1985). Some materials that are part of the public record or do not contradict the complaint may be considered by a court in deciding a Rule 12(b)(6) motion to dismiss. *See Papasan v. Allain*, 478 U.S. 265, 268 n. 1, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Hollis v. United States Dep't of Army*, 856 F.2d 1541, 1543-44 (D.C. Cir. 1988).

State v. Coeur D'Alene Tribe, 164 F.3d 1102,1107 (8th Cir. 1999).

1. First Search Warrant

On May 2, 2014, Sgt Goodman received notification from Special Agent ("SA") Jesse Smith who was assigned to the Internet Crimes Against Children Task Force with the North

Dakota Bureau of Criminal Investigations ("NDBCI") that he downloaded child pornography from an IP address that came back to a City of Minot residence (Exh. 7[1]). SA Smith had previously provided Sgt. Goodman with the results of a federal subpoena which was issued to a local internet service provider (Exh. 7). These results showed the suspect address of 212 18th Street NW, Minot, North Dakota (Exh. 7)

SA Smith sent Sgt. Goodman a copy of a signed and notarized Application and Affidavit for Search Warrant executed May 2, 2014 ("First Warrant Application") to be presented to a local judge (Exh. 2). The First Warrant Application (Exh. 2) was comprised of thirteen single spaced pages (including proposed Search Warrant) of information describing how Peer to Peer file sharing works, and specifically the operation of a BitTorrent network, information on how data shared through such a network is tracked, and SA Smith's specific investigation in this case. The First Warrant Application explained how SA Smith identified a computer with a specific IP address as a potential download candidate (source) for at least 1 file of investigative interest (Exh. 2 at p. 11.) SA Smith directed his investigation to this specific IP address, and noted such IP address had been recently detected as having been associated with 1 investigative file of interest by investigator(s) conducting keyword searches or hash value searches for files related to child abuse material including child pornography on the BitTorrent network. (Exh. 1 at ¶ 2; Exh. 2 at p. 12.) On March 30, 2014, the subject IP address was seen with 2 torrent files. (Exh. 1 at ¶ 2(A)(1).) SA Smith successfully downloaded 10 files from the subject IP address which contained images of a series of prepubescent females about 8-10 years of age, with another 150 files containing images of children between the ages of 10-14 years. (Exh. 1 at ¶ 2(a)(2); Exh. 2 at pp. 11-12.) The children were exposing their vagina, anus and breasts in the images. (Exh. 1

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[1] Unless otherwise expressly stated, all exhibits referenced in this brief are attached to the *Affidavit of Shawn A. Grinolds* dated February 6, 2015, filed herewith, under seal pursuant to *Order* (doc. 30).

at ¶ 2(B)(2); Exh. 2 at p. 12.) SA Smith then determined the specific IP address belonged to Midcontinent Communication in Sioux Falls, South Dakota, and was assigned to the geographic location of Minot, North Dakota. (Exh. 1 at ¶¶ 3-4; Exh. 2 at p. 12.) SA Smith contacted SA Darick Trudell with DHS/HIS on April 2, 2014 and informed SA Trudell of the investigation. (Exh. 1 at ¶ 5; Exh. 2 at p. 12). SA Trudell prepared a subpoena for basic subscriber information related to the subject IP address. (Exh. 1 at ¶ 6; Exh. 2 at p. 12) SA Trudell advised SA Smith on April 4, 2014 that the results of the subpoena issued to Midcontinent Communications established the specific IP address for the time period during which SA Smith conducted his download of the child pornography belonged to Jose Garcia at 212 18th Street NW, Minot, North Dakota. (Exh. 1 at ¶ 6; Exh. 2 at p. 13.) Based on this information, SA Smith believed there was probable cause to believe that located at the residence of 212 18th Street NW, Minot, North Dakota were items constituting or containing child pornography as described in an Exhibit A attached to the First Warrant Application.

Sgt. Goodman presented the First Warrant Application described above to District Judge Doug Mattson on May 2, 2014, and left the search warrant with the judge for his review over the weekend. (Exh. 2 at p. 13.) Judge Mattson signed the search warrant on May 5, 2014. (Exh. 3)

At 9:00 am on May 6, 2014, Sgt. Goodman met with Special Agent Smith, Sgt. Jay Laudenschlager, Detective Greg Johnson, Detective Jessica Mosman and defendant Detective Krista Thompson, to brief them on service of the search warrant. (Exh. 7) Officers from the patrol division who assisted were Officer Aaron Moss and Officer Jay Haaland. They executed the search warrant at 9:30 a.m. (Exh. 1 at ¶ 7; Exh. 7 at p. 1; Exh. 8 at p. 1.) Officer Moss knocked on the door of the subject residence several times and announced “police, search warrant” several times. (Exh. 7 at p. 1; Exh. 9; Exh. 10 at p. 1; Exh. 11.) With no answer of the door, Officer Moss tried the doorknob and found that the door was unlocked. (Exh. 7 at p. 1; Exh. 9; Exh. 10 at p. 1; Exh. 11.) The officers entered the house and found six individuals therein, including an infant. (Exh. 7 at p. 1) Two additional residents of the home arrived on the scene while officers were present. (Exh. 7 at p. 1.) Sgt. Goodman and Detective Thompson interviewed all seven subjects, who provided recorded statements (which have not been transcribed). (Exh. 7 at p. 1; Exh. 8 at p. 1.) As all interviews were completed and the computers/electronics were previewed, the suspicions of this criminal activity seemed to point towards one tenant who was not currently home – the Plaintiff. (Exh. 7 at p. 1; Exh. 8 at p. 2.) Plaintiff was at work at Trinity Nursing Home. (Exh. 7.) Information given at the residence was that Plaintiff always carries a blue bag with him that has a laptop computer inside. (Exh. 7 at p. 1; Exh. 1 at p. 8.) The officers were informed Plaintiff was observed using his laptop in the residence every night. (Exh. 1 at ¶ 8; Exh. 8 at p. 2.) The officers were also informed Plaintiff drives a blue Hyundai with North Carolina plates. (Exh 7; Exh. 1 at ¶ 8.) The officers also obtained information on a former tenant of the residence who supposedly received a "warning letter" from Midcontinent Communication regarding the unlawful downloading of movies. (Exh. 7.) The investigation at the residence was completed and SA Smith, Sgt. Goodman and Detective Thompson went to the Trinity Nursing Home in an attempt to meet with Plaintiff. (Exh. 1 at ¶ 13; Exh. 7; Exh. 8 at p. 2.)

A vehicle matching the description of Plaintiff's car was found in the parking lot of the Trinity Nursing Home. (Exh. 1 at ¶ 13; Exh. 7; Exh. 8 at pp. 2-3.) SA Smith could see an open blue bag with a laptop inside within the vehicle by looking through the passenger side window. (Exh. 1 at ¶ 13; Exh. 4 at p. 13; Exh. 7; Exh. 8 at p. 3.) The officers proceeded into the nursing home and to the front desk/reception where they asked for Plaintiff. (Exh. 7.) After a short while, Plaintiff met with the officers in a private conference room at the Trinity Nursing Home. (Exh. 1 at ¶ 14; Exh. 4 at p. 13; Exh. 7; Exh. 8 at p. 2.) Sgt. Goodman explained to Plaintiff why the officers were there, and read Plaintiff his rights (Miranda Warning), as he had also done with the subjects at the residence. (Exh. 7; Exh. 8 at p. 2.) Plaintiff advised he did not want to speak with the officers. (Exh. 1 at ¶ 14; Exh. 4 at p. 13; Exh. 7; Exh. 8 at p. 2.) Sgt. Goodman than asked Plaintiff if he would consent to a search of his vehicle and Plaintiff stated no and that a search warrant would be required. (Exh. 1 at ¶ 14; Exh. 4 at p. 13; Exh. 7; Exh. 8 at pp. 2-3.) Law enforcement then discontinued their questioning of Plaintiff. (*Id.*) City of Minot Police Officer Wes Froehlich was called to the scene to watch Plaintiff's vehicle while SA Smith, Sgt. Goodman and Detective Thompson left the scene to apply for a search warrant. (Exh. 1 at ¶ 14; Exh. 4 at p. 13; Exh. 7; Exh. 8 at p. 3.)

SA Smith prepared and executed a second Application and Affidavit for Search Warrant relative to Plaintiff's vehicle dated May 6, 2014 ("Second Warrant Application") (Exh. 4). The Second Warrant Application, comprised of fourteen single spaced pages (including proposed Search Warrant), essentially contained all of the same information contained in the First Warrant Application, and provided additional updated information regarding the search of the residence under the First Warrant Application, the interviews of the subjects at the residence, and the observed laptop located within Plaintiff's vehicle. (Exh. 4.) Judge Mattson signed a Search Warrant relative to Plaintiff's vehicle at 1:35 p.m. on May 6, 2014. (Exh. 5.) SA Smith, Sgt. Goodman and Detective Thompson returned to the Trinity Nursing Home with the search warrant where they again made contact with Plaintiff. (Exh. 1 at ¶ 15; Exh. 7; Exh. 8 at p. 3.) The search warrant was provided to Plaintiff and request was made for the keys to his vehicle. (Exh. 7.) Plaintiff provided his keys. (Exh. 7.) At approximately 2:00 p.m., Detective

Thompson and SA Smith searched Plaintiff's vehicle while Sgt. Goodman and Officer Froehlich watched Plaintiff. (Exh. 1 at ¶ 15; Exh.7; Exh. 8 at p. 3.) Plaintiff wanted to stand by during the search and was acting very suspicious. (Exh. 7; Exh. 8 at p. 3.) Agent Smith ran a preview on the laptop computer and was not able to find any child pornography. (Exh. 1 at ¶ 15; Exh. 7; Exh. 8 at p. 3.) He did find that Plaintiff appeared to be using a "proxy IP" that raised suspicion with Smith. (Exh. 1 at ¶ 15; Exh. 7; Exh. 8 at p. 3.) SA Smith also stated he found evidence of Plaintiff possibly using an Apple Computer. (Exh. 1 at ¶¶ 15-16; Exh. 7; Exh. 8 at p. 3.) SA Smith asked Plaintiff about the Apple device and Plaintiff was very evasive about whether or not he had one and where it would be located. (Exh. 1 at ¶¶ 15-16; Exh. 7; Exh. 8 at p. 3.) The search was completed and the keys, vehicle, and computer were turned back over to Plaintiff. (Exh. 1 at ¶ 16; Exh. 7; Exh. 8 at p. 3.)

Subsequently, the former tenant of the residence who supposedly received a warning letter from Midcontinent Communication about unlawful movie downloads was tracked down and interviewed. (Exh. 1 at ¶ 17; Exh. 7; Exh. 8 at p. 3.) This former tenant was very cooperative and forthcoming with information. (Exh. 7.) He was under the impression he may be in trouble for unlawfully downloading movies from the internet. (Exh. 7; Exh. 8 at p. 3.) The former tenant consented to a search of his new residence and computer located therein, and a recorded statement was taken (not transcribed). (Exh. 7.) The preview of the former tenant's computer showed he had the software that was sharing the child pornography with SA Smith, but this was also the same software that he used to download the movies that Midcontinent warned him about. (Exh. 1 at ¶ 17; Exh. 7; Exh. 8 at p. 3.) No child pornography was found on the former tenant's computer. (Exh. 1 at ¶ 17; Exh. 7.)

Sgt. Goodman subsequently received a telephone call from the wife of Jose Garcia, the tenant of the residence searched pursuant to the First Search Warrant. (Exh. 7.) She inquired whether law enforcement had spoken to Plaintiff and the former tenant. (Exh. 7.) Sgt. Goodman advised law enforcement had spoken with them, and that at this time it was undetermined exactly who was responsible for the child pornography at their residence. (Exh. 7.) Sgt. Goodman asked Mrs. Garcia whether she had ever seen Plaintiff on or with an Apple Computer and she stated that she had. (Exh. 7.)

C. Plaintiff's Allegations in Complaint

As a preliminary matter, the allegations contained in Plaintiff's Complaint are replete with wholly conclusory allegations, or legal conclusions that the Plaintiff draws from the facts pled. As discussed under the Applicable Standards below, such allegations need not be accepted as true in the context of this motion to dismiss. In any event, excluding the repetitive allegations contained in the introduction to the Complaint, the Plaintiffs allegations at issue are contained in paragraphs 7 through 19 of his Complaint, as follows:

> 7. On May 6, 2014, Plaintiff interrupted by police at his employment of the nursing home facility in Minot, ND.
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> 8. On May 6, 2014, Plaintiff was interrupted from work and told by managers at the nursing facility to arrive at a conference room. At the conference room, Plaintiff was informed to go to a conference room and Minot Officers and Special Agent detectives were awaiting to speak and question. This notified Plaintiff's employer at the nursing home of the criminal investigation ensuing and placing Plaintiff in a bad light.
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> 9. Detective Goodman informed this Plaintiff Doe that an investigation for computer child porn was being conducted. Next, Det. Goodman relayed that earlier the residence of Jose Garcia, at 212 18th St. N.W. Minot, ND, which included Plaintiff's room rental was seized and searched. Further, Det. Goodman stated in continuing to search and seizure of Plaintiff's computer and property for criminal child porn. Plaintiff was detained at a point beyond any reasonable understanding of the immediate vicinity, that is the residence at 212 18th St. N.W. Minot.

10. Then, Det. Goodman stated that Plaintiff may request a search warrant for the search and seizure. Though, Defendant Goodman had no evidence or facts to directly link Plaintiff to computer child porn.

11. Therefrom, Plaintiff had trouble understanding the ramifications of circumstances. However, Plaintiff requested a search warrant for my computer. Any denied to speak or communicate with the Detective's Goodman and other officers. Goodman conveyed that he may be able to obtain a search warrant and return.

12. Plaintiff was returned to work very distracted. All the while, a uniformed Patrol Officer in a Minot patrol vehicle in the middle of the employer's parking lot, blocked and detained Plaintiff's personal vehicle. And a couple of hours later was contacted to return to the conference room and Det. Goodman and other officers presented Plaintiff with a search warrant. (Exhibit 1 – Search Warrant for Plaintiff). Again, inflicting tortious interference with at all employment at Plaintiff's employment in nursing home with privacy violations and defamation. And, again, Plaintiff was detained beyond the immediate vicinity of the residence from the initial unreasonable general search warrant. The facially valid search warrant (Exh. 1) continued and commenced the Defendant Detectives intrusion to seize and search Plaintiff's and property and computer in the public plain view of employer's parking lot with onlookers. The facial search warrant lacked probable cause, evidence, and facts linking Plaintiff with computer child porn. There was no nexus to connect Plaintiff with downloading, no subscription, or dissemination of computer child porn by the facial warrant and/or false statements indicating thereof.

The concept of probable cause –a familiar but fluid standard for a court to apply:

> **the courts confront them: 1) as to subscribers of child pornography sites, the amount of information needed in order to conclude that there is probable cause to search the subscriber's computer; and 2) as to distributors or receipients of child pornography, establishing the location of the computer used to distribute or receive the materials.**
>
> **Without any indication that any of these individuals downloaded or uploaded or transmitted or received any image of child pornography, without any evidence that these individuals did anything more than simply subscribe, the Government argues that it had the right to enter their homes to conduct a search and seize their computers, computer files and equipment, scanners, and digital cameras. This cannot be what the Fourth Amendment contemplated.**

Here, the intrusion is potentially enormous.

13. Defendants' Thompson proceeded to search Plaintiff's vehicle, meanwhile Special Agent Jesse smith (SA Smith) seized and searched the computer. After

about approximately 20 minutes, SA Smith informed Det. Goodman that there were NO CHILD PORN on Plaintiff's computer. There was no charging arrest. Still, Plaintiff was detained without any links to crime porn. Defendants' continued to question, interrogate and harass Plaintiff about computer porn. Plaintiff did not want to be questioned and responded with no and no's. Defendants' discretionary function exceeded legal bounds and was grossly negligent by misconduct.

14. Finally, Defendants' released Plaintiff and had to clean and arrange the vehicle to be able to leave.

15. Plaintiff eventually arrived at his rental room residence at 212 18ty St. N.W. Minot. Plaintiff's property was scattered all over the room and property was damaged from the illegal General Search Warrant conducted by Minot Polic in the morning approximately at 9 AM. Luggage, bags, and locks broken and damaged from the separate room rental of a door with a **lock and key**. **This search and seizure was conducted prior to Plaintiff's request for a specific search warrant and search and seizure at Plaintiff's employer.**

16. There upon, landlord renter Jose Garcia conveyed to Plaintiff that the police contacted and notified him that I did not want to be searched and Garcia stated, he did not know where the download of computer porn came from. Plaintiff was asserting his constitutionally protected rights.

17. Consequently, Garcia relayed in releasing Plaintiff from the lease of the room rental and not renewing it at the end of the month, to leave. Furthermore, Plaintiff was terminated from employment the next day. In direct violation of the Privacy Act and regulations governing what law enforcement my [sic] publicly disclose regarding ongoing investigations. Here, the Defendants' intentionally, willfully, and negligently disclosed records kept by the agencies pertaining to Plaintiff Doe in a false implication. Thus, resulted in Plaintiff being homeless and looking for affordable housing without employment and looking for suitable employment for many weeks.

18. Through Defendants' intentional, gross and reckless negligence, and misconduct acts resulting in defamation, tortious interference of at-will employment, harassment, inter alia, have violated Plaintiff Doe's clearly established constitutional rights.

19. Plaintiff rights as set forth above and other rights that will be proven at trial were violated. Defendants' intentional, willful, and negligent of the unauthorized disclosures of records pertaining to Plaintiff had and having an adverse effect on Plaintiff. Plaintiff suffered grave general and special damages and economic and non-economic damages in employment, wrongful eviction, and caused extreme mental and emotional distress.

(Complaint [doc. 9] at ¶¶ 7-19 (emphasis and errors in original).)

III. ARGUMENT

A. Applicable Standards

Minot Defendants request dismissal of Plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure as, even assuming all of Plaintiff's factual allegations (excluding legal conclusions) to be true, his claims fail to state a viable cause of action as a matter of law. In addition, even assuming all of Plaintiff's factual allegations to be true, the Minot Defendants would be entitled to qualified immunity.

In the alternative, should Plaintiff's factual allegations assert a viable cause of action against Minot Defendants for which qualified immunity does not apply, dismissal at this time is none-the-less appropriate under either Rule 12 or 56 of the Federal Rules of Civil Procedure as the official criminal investigation records presented establish probable cause supporting the search warrants issued by the District Judge and the criminal investigation at issue.

1. Motion to Dismiss – Fed. R. Civ. P. 12(b)(6)

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move the Court to dismiss a claim if, on the pleadings, a party has failed to state a claim upon which relief may be granted. In reviewing a motion to dismiss, the court takes all facts alleged in the complaint to be true. *Zutz v. Nelson*, 601 F.3d 842, 848 (8th Cir. 2010).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. Thus, although a complaint need not include detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Id. (citations omitted). The Court need not accept as true wholly conclusory allegations, *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999), or legal conclusions that the plaintiff draws from the facts pled. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Well-pleaded facts, not legal theories or conclusions, determine the adequacy of the complaint. *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009). The facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Id.*

> In this circuit, Rule 12(b)(6) motions are not automatically converted into motions for summary judgment simply because one party submits additional matters in support of or in opposition to the motion. *See Martin v. Sargent*, 780 F.2d 1334, 1336-37 (8th Cir. 1985). Some materials that are part of the public record or do not contradict the complaint may be considered by a court in deciding a Rule 12(b)(6) motion to dismiss. *See Papasan v. Allain*, 478 U.S. 265, 268 n. 1, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Hollis v. United States Dep't of Army*, 856 F.2d 1541, 1543-44 (D.C. Cir. 1988).

State v. Coeur D'Alene Tribe, 164 F.3d at 1107.

2. Summary Judgment – Fed. R. Civ. P. 56

The summary judgment standard of review was described by the Eighth Circuit Court of Appeals as follows:

> Summary judgment is appropriate only when the pleadings, depositions and affidavits submitted by the parties indicate no genuine issue of material fact and show that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. The party seeking summary judgment must first identify grounds demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 577 U.S. 317, 323 (1986). Such a showing shifts to the non-movant the burden to go beyond the pleadings and present affirmative evidence showing that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co.*, 475 U.S. 574, 586 (1986). The non-movant "must show there is sufficient evidence to support a jury verdict in [his] favor." *Nat'l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 607 (8th Cir. 1999). "Factual disputes that are irrelevant or unnecessary will not be counted," *Anderson*, 477 U.S. at 248, and a mere scintilla of evidence supporting the non-movant's position will not fulfill the non-movant's burden, *id.* at 242.

Uhiren v. Bristol-Meyers Squibb Company, Inc., 346 F.3d 824, 827 (8th Cir. 2003). All issues before this Court involve questions of law, or questions of fact upon which no reasonable juror could disagree.

B. Plaintiff's Complaint Fails To State A Claim Upon Which Relief May Be Granted

For purposes of this motion, the Plaintiff's allegations of wrongdoing alleged in his Complaint can be summarized as follows:

1. The search of the Plaintiff's rented room residence located at 212 18th Street N.W. Minot by law enforcement during his absence was unlawful and not supported by probable cause.

2. The search of Plaintiff's vehicle and laptop plainly visible within the vehicle was unlawful and not supported by probable cause.

3. Law enforcement's securing of Plaintiff's vehicle while a search warrant was being secured allegedly violated his rights.

4. Plaintiff's privacy rights were allegedly violated, and Plaintiff was allegedly defamed, when law enforcement questioned Plaintiff at his place of employment, and disclosed the nature of their investigation, which allegedly placed Plaintiff in a bad light with his employer and landlord.

1. Probable Cause Supported The Search of Plaintiff's Rented Room

With respect to the search of Plaintiff's rented room, it should be noted the First Search Warrant (Exh. 3) signed by Judge Mattson was for the search of 212 18th Street NW, Minot for the property described in the attached Exhibit A (i.e. child pornography, etc.). The search warrant was not limited to any particular portion of the residence. This was only logical as SA Smith's investigation revealed the IP address from which he was able to download the child pornography belonged to Jose Garcia at the subject residence[2]. As a result, the child

[2] Based upon interviews of the occupants of the subject residence, it was determined the residence was owned or managed by First Minot Management and rented to Jose Garcia, who in

pornography could have originated from any electronic device utilizing the internet service within the residence. Therefore, a search warrant was obtained to search the entire premises for the contraband at issue. The results of SA Smith's investigation, including his download of child pornography from the IP address assigned to the address of the residence, discussed above, and detailed in SA Smith's Application and Affidavit for Search Warrant (Exh. 6) provided ample probable cause to support the issuance of the search warrant for the residence and the search of the entire residence for contraband as described in the First Search Warrant.

2. Probable Cause Supported The Search of Plaintiff's Vehicle Pursuant to the Second Search Warrant

As to the Plaintiff's vehicle located in the parking lot of the Trinity Nursing Home, a laptop computer was visible in an open blue bag, in plain sight, within the vehicle by looking through the passenger window. (Exh. 1 at ¶ 13; Exh. 7.) Individuals interviewed at the residence earlier in the day informed law enforcement that Plaintiff always carries a blue bag with him that has a laptop computer inside. (Exh. 1 at ¶ 8; Exh. 7.) An individual residing at the residence also advised law enforcement he observed Plaintiff using his laptop at the residence every night. (Exh. 1 at ¶ 8; Exh. 7; Exh. 8 at p. 2.) The fact Plaintiff resided at the address to which the subject IP address was assigned, combined with the fact no child pornography was found on any other electronic device previewed at the residence earlier that day, gave law enforcement probable cause to believe Plaintiff's laptop computer contained the contraband at issue. The facts establish Law Enforcement's suspicion the subject laptop contained illegal contraband was based upon more than simply a hunch. Their belief was based upon facts obtained during the course of a rapidly developing investigation. The Second Search Warrant

turn, sub-rented portions of the residence to others, including Plaintiff. (Exh. 7; Exh. 8 at p. 2.) Jose Garcia purportedly paid the monthly internet bill. (Exh. 7; Exh. 8 at p. 2.)

(Exh. 5) was signed by Judge Mattson to facilitate the search of Plaintiff's vehicle for evidence of criminal activity. SA Smith's Application and Affidavit for Search Warrant (Exh. 4), again provided ample probable cause for the issuance of the Second Search Warrant.

3. Law Enforcement Was Justified In Securing Plaintiff's Vehicle Pending Diligent Efforts To Secure A Search Warrant

With respect to Plaintiff's vehicle, as alleged by Plaintiff, after Plaintiff advised law enforcement of their need to obtain a search warrant for purposes of searching his vehicle, law enforcement discontinued their questioning of Plaintiff, and left the Trinity Nursing Home for the purpose of securing a search warrant. (Complaint (doc. 9) at ¶¶ 9-12); Exh. 1 at ¶ 14; Exh. 7; Exh. 8 at pp. 2-3.) Plaintiff admits in his complaint he returned to work at the Trinity Nursing Home between the initial police interview and the return of law enforcement with the Second Search Warrant for the vehicle. (Doc. 9 at ¶ 12.) Plaintiff provided the keys to his vehicle to law enforcement upon being presented with the Second Search Warrant by law enforcement upon their return to the Trinity Nursing Home (this occurred in the private conference room). Law enforcement then diligently proceeded to search his vehicle and the subject laptop for the contraband. Plaintiff chose to observe the search. When no contraband was discovered, possession of Plaintiff's keys and vehicle was returned to the Plaintiff.

As a preliminary matter, once the Second Search Warrant for the vehicle was signed by the district judge at 1:35 p.m. on May 6, 2014, Law Enforcement was unquestionably permitted to secure the subject vehicle as necessary to complete the search of the vehicle for the contraband described in the Second Search Warrant. At issue in this case is Law Enforcement's securing of the Plaintiff's vehicle following the conclusion of the initial discussions with Plaintiff when a police officer secured the vehicle, and the signing of the Second Search Warrant, which Plaintiff alleges was a couple of hours time. During this period of time, Plaintiff concedes he returned to work. Although Minot Defendants deny Plaintiff was actually detained during this period of time, even assuming, arguendo, the securing of his vehicle (which Plaintiff essentially admits he had no intention of using during this period of time as he returned to work) constituted a detention, under the circumstances alleged in this case, any such detention was reasonable and justified as an investigative stop, or otherwise.

As explained by the United States Supreme Court in *U.S. v. Sharp*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed2d 605 (1985):

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But the fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, itself, render the search unreasonable. The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.

Id. at pp. 686-87 (citations and quotations omitted). In addition, police are not responsible for any delay in an investigation attributable to the actions of the suspect, whether innocent or intentional. *Id.* at p. 687 & n6. A somewhat longer detention can be justified as the result of a graduated response to the demands of the particular situation. *Id.* (citation omitted). In other words, a court is to consider the totality of the circumstances in weighing the reasonableness of law enforcement's investigation.

In the present case, Law Enforcement attempted to question Plaintiff briefly at the Trinity Nursing Home. Such attempted questioning ended upon Plaintiffs assertion he did not want to answer any questions and insistence upon a search warrant for his vehicle. Plaintiff returned to work and Law Enforcement diligently sought the demanded search warrant. Upon law enforcement's return, allegedly two hours later, the vehicle and laptop computer were searched pursuant to the Second Search Warrant. When no contraband was found, possession of the vehicle and laptop was returned to Plaintiff. Therefore, even assuming Plaintiff's purely factual allegations to be true, such would not support a viable claim against the defendants in this action as Law Enforcement's investigation was reasonable, as a matter of law.

4. Law Enforcements Disclosure Of The Nature Of The Criminal Activity Being Investigated Did Not Violate Plaintiff's Right To Privacy, Or Defame Plaintiff

Plaintiff's assertion Law Enforcement violated the Privacy Act of 1974, codified at 5 U.S.C. § 552a) or otherwise revealed anything to which he had a right to privacy is false.

First, there is no private right of action under the Privacy Act against an official or employee of a municipal or state agency – it applies exclusively to federal agencies. *See Spurlock v. Ashley County*, 281 Fed.Appx. 628, 629 (8th Cir. 2008)(concluding plaintiff failed to state a claim under Privacy Act as defendant was not a federal agency)(citing *Pennyfeather v. Tessler*, 431 F.3d 54, 56 & n.1 (2d Cir. 2005)(concluding there is no private right of action under Privacy Act against official or employee of municipal or state agency); Schmitt v. City of Detroit, 395 F.3d 327, 329-31 (6th Cir. 2005)(holding Privacy Act applies exclusively to federal agencies); Unt v Aerospace Corp., 765 F.2d 1440, 1447 (9th Cir. 1985)(private right of action created by Privacy Act is specifically limited to actions against federal agencies); *Polchowski v. Gorris*, 714 F.2d 749, 752 (7th Cir. 1983)(Privacy Act applies only to federal agencies). Plaintiff's claims under the Privacy Act fail to state a viable claim as a matter of law and should be dismissed.

Second, the information alleged to have been revealed by Law Enforcement at issue in this case was the fact Law Enforcement was investigating the source of child pornography downloaded by SA Smith. Query how Plaintiff could have had any expectation of privacy in relation to such information, particularly when Plaintiff denies he possessed any child pornography. Simply being the subject of an investigation is not a personal matter to which a right to confidentiality exists. *See Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996)(citing *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995)("Criminal activity is . . . not protected by the right to privacy."; *Holman v. Central Arkansas Broadcasting Co.*, 610 F.2d 542, 544 (8th Cir. 1979)("[N]o right to privacy is invaded when state officials allow or facilitate publication of an official act such as an arrest"); *Baker v. Howard*, 419 F.2d 376, 377 (9th Cir. 1969)(holding that constitutional right is not implicated even when police officers circulate false rumors that person has committed a crime)).

The gist of Plaintiff's claim is he was embarrassed by the fact others were aware he was being investigated for potential possession of child pornography. There is no legal obligation upon law enforcement to keep the nature of their investigation confidential. Any such obligation would severely hamper law enforcement's ability to investigate suspected criminal activity. Query how law enforcement would go about questioning suspects or witnesses about criminal activity if law enforcement could not reveal the nature of the crime being investigated. Such investigations would similarly be hampered if law enforcement had to ensure no bystanders overheard such questioning.

Plaintiff's defamation claim also fails as a matter of law. At no time did law enforcement tell anyone Plaintiff had in fact engaged in criminal activity, and Plaintiff has not made such allegation. Plaintiff was simply a suspect who was questioned by Law Enforcement. Statements allegedly made by Law Enforcement to third-parties concerning the investigation were absolutely true, and were therefore not defamatory as a matter of law. *See* N.D.C.C. § 14-02-04 (defining civil slander, in part, as "a false and unprivileged publication other than libel . . ."). In addition, communications made in the proper discharge of an official duty are privileged. N.D.C.C. § 14-02-15(1). The statements allegedly made by Law Enforcement were made in the proper discharge of their official duties. Further, communications made with malice to a person interested therein by one who also is interested, or made by a person who is requested by a person interested to give the information, are also privileged. In this case, Plaintiff asserts the allegedly defamatory statements were made to his employer, a nursing home which cares for vulnerable elderly people, and to the wife of the person to whom the IP address for the residence was registered, and who was Plaintiff's landlord (i.e. Jose Garcia). Such persons clearly had an interest in the information allegedly conveyed – that law enforcement was investigating an unlawful download of child pornography. The alleged communications, even assuming they were false, which is denied, were privileged.

Plaintiff was not arrested or charged with any crime and all of his property was returned to him immediately following the search by Law Enforcement. Law Enforcement has no responsibility for how third-parties may perceive such investigation, or the actions such third-parties may take as a result of an investigation. Law Enforcement in this case did not reveal any sensitive information of a confidential nature to which Plaintiff had an expectation of privacy, such as Plaintiff's health records.

Plaintiff's privacy and defamation claims fail as a matter of law.

C. Minot Defendants Are Entitled To Qualified Immunity

In addition, the Minot Defendants are entitled to qualified immunity. The determination of qualified immunity is ultimately a question of law and requires a two-step inquiry: "(1) [whether] the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) [whether] the right was clearly established at the time of the deprivation." *Parrish v. Ball*, 594 F.3d 993, 1001 (8th Cir. 2010)(quotation omitted). The defendant has the burden of proof with the exception that the plaintiff must demonstrate that the law allegedly violated was clearly established. *Harrington v. City of Council Bluffs, Iowa*, 678 F.3d 676, 679 (8th Cir. 2012).

The Supreme Court has instructed that the issue of qualified immunity be resolved "at the earliest possible stage of the litigation." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)(quotation omitted); *see Mathers v. Wright*, 636 F.3d 396, 399 (8th Cir. 2011). This is because the defense is "an immunity from suit rather than a mere defense to liability" and "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Mathers v. Wright*, 636 F.3d at 399 (citing *Mitchell v. Forsyth*, 472 U.S. at 526). In addition, a "driving force behind the creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials be resolved prior to discovery." *Pearson v. Callahan*, 555 U.S. at 231 (quotation omitted).

In the present case, the facts alleged by Plaintiff, even if true, would not demonstrate a deprivation of a constitutional or statutory right which was clearly established at the time of the alleged deprivation. As discussed above, there was ample probable cause to support the search warrants issued for the search of both the subject residence, as well as the computer in Plaintiff's vehicle for child pornography. SA Smith downloaded child pornography from an IP address registered to the subject residence. Any electronic device utilizing the internet service in the subject residence could have been the source of the child pornography. This would naturally include portable electronic devices which may have been used in the residence during the time period in which SA Smith downloaded the child pornography. A search of the residence and preview of electronic devices contained therein did not reveal the presence of any child pornography. Individuals questioned at the residence confirmed Plaintiff carried a laptop with him in a blue bag and that Plaintiff used his laptop in the residence. Following up with an investigation of the Plaintiff was logical and reasonable. As discussed above, a suspect does not have a right to have an investigation of suspected criminal activity conducted privately. Any such privacy requirement would severely hamper the ability of law enforcement to investigate suspected criminal activity.

C. Plaintiff Should Not Be Allowed to Prosecute This Action Under a Pseudonym

In the alternative, should the Court not dismiss Plaintiff's claims against the Minot Defendants for the reasons above, the Court should none-the-less require Plaintiff to prosecute this action under his real name. Plaintiff is utilizing the pseudonym of Jose Doe to identify himself in this action. As noted in footnote 1 to Magistrate Judge Charles S. Miller, Jr.'s *Order re § 1915(e)(2) Screening, For Service of Complaint, and to Show Cause* (doc. 10), "[t]he court doubts that "Jose Doe' is plaintiff's real name. This court's order should not be taken as permitting plaintiff to use a pseudonym in this litigation. This is a point that may have to be resolved later." Jose Doe is not the real name of the Plaintiff. Plaintiff has not obtained the Court's permission to utilize a pseudonym in this action. Plaintiff was previously denied permission to utilize a pseudonym by District Judge Gary H. Lee in a nearly identical civil action entitled *Jose Doe v. Minot Police Department, et al*, Ward Count District Court, State of North Dakota, Civil No. 51-2014-CV-00904. Said State Court civil action was voluntarily dismissed, without prejudice, at the request of Plaintiff.

Pursuant to Federal Rule of Civil Procedure 10(a), "[t]he title of the complaint must name all the parties . . ." and Federal Rule of Civil Procedure 17 provides further "[a]n action must be prosecuted in the name of the real party in interest." Counsel for Minot Defendants have not located any controlling Eighth Circuit law on the issue of the use of a pseudonym, but it appears federal courts generally hold the use of a pseudonym is only permitted in exceptional circumstances. As explained by the United States Court of Appeals for the Second Circuit in *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189-90 (2d Cir. 2008):

> Pursuant to Rule 10(a) of the Federal Rules of Civil Procedure, "[t]he title of [a] complaint must name all the parties." This requirement, though seemingly pedestrian, serves the vital purpose of facilitating public scrutiny of judicial proceedings and therefore cannot be set aside lightly. Certainly, "[i]dentifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts." *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir.1997) (Posner, J.). Courts have nevertheless "carved out a limited number of exceptions to the general requirement of disclosure [of the names of parties], which permit plaintiffs to proceed anonymously." *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 685 (11th Cir.2001). Indeed, we have approved of litigating under a pseudonym in certain circumstances, *see, e.g.*, *Smith v. Edwards*, 175 F.3d 99, 99 n. 1 (2d Cir.1999) ("For the sake of the privacy of plaintiff's child, pseudonyms for plaintiff and his family are employed throughout this opinion."), but we have not yet set forth the standard for permitting a plaintiff to do so, *see, e.g., Doe v. Menefee*, 391 F.3d 147, 149 n. 1 (2d Cir.2004) ("We decline to address the complex question of the applicable standards for litigating under a pseudonym under these circumstances."). Other Circuits have established such a standard, and several district courts in this Circuit have recently grappled with this issue. Drawing on both the rules adopted by other Circuits and the experience of the district courts of our Circuit, we now set forth the standard governing the use of pseudonyms in civil litigation in our Circuit.
>
> The courts that have considered this issue have framed the relevant inquiry as a balancing test that weighs the plaintiff's need for anonymity against countervailing interests in full disclosure. In *Aware Woman Center*, the Eleventh Circuit explained that the "ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." 253 F.3d at 685 (internal quotation marks omitted). Likewise, the Tenth Circuit "weigh[s] the plaintiff's claimed right to privacy against the countervailing public interest in [open proceedings]," *M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir.1998), as does the Fifth Circuit, *see Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. Unit A Aug.1981) (discussing "the balance pitting privacy concerns against the presumption of openness of judicial proceedings"). Similarly, the Ninth Circuit has held that "a party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs [1] prejudice to the opposing party and [2] the public's interest in knowing the party's identity." *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d

> 1058, 1068 (9th Cir.2000). Variations of the Ninth Circuit's formulation have been adopted previously by district courts in our Circuit. *See, e.g., Doe v. Del Rio,* 241 F.R.D. 154, 157 (S.D.N.Y.2006); *EW v. N.Y. Blood Ctr.,* 213 F.R.D. 108, 110 (E.D.N.Y.2003). We agree that the interests of both the public and the opposing party should be considered when determining whether to grant an application to proceed under a pseudonym. Accordingly, we endorse the Ninth Circuit's formulation and hold that when determining whether a plaintiff may be allowed to maintain an action under a pseudonym, the plaintiff's interest in anonymity must be balanced against both the public interest in disclosure and any prejudice to the defendant.
>
> This balancing of interests entails the consideration of several factors that have been identified by our sister Circuits and the district courts in this Circuit. We note with approval the following factors, with the caution that this list is non-exhaustive and district courts should take into account other factors relevant to the particular case under consideration: (1) whether the litigation involves matters that are "highly sensitive and [of a] personal nature," *Zavaras,* 139 F.3d at 803; *see also James v. Jacobson,* 6 F.3d 233, 238 (4th Cir.1993); *Doe v. Frank,* 951 F.2d 320, 323 (11th Cir.1992); (2) "whether identification poses a risk of retaliatory physical or mental harm to the ... party [seeking to proceed anonymously] or even more critically, to innocent non-parties," *Jacobson,* 6 F.3d at 238; *see also Zavaras,* 139 F.3d at 803; *Doe v. Shakur,* 164 F.R.D. 359, 361 (S.D.N.Y.1996); (3) whether identification presents other harms and the likely severity of those harms, *see Advanced Textile Corp.,* 214 F.3d at 1068, including whether "the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity," *Zavaras,* 139 F.3d at 803; (4) whether the plaintiff is particularly vulnerable to the possible harms of disclosure, *see Advanced Textile Corp.,* 214 F.3d at 1068, particularly in light of his age, *see Jacobson,* 6 F.3d at 238; *see also Del Rio,* 241 F.R.D. at 157; (5) whether the suit is challenging the actions of the government or that of private parties, *see Jacobson,* 6 F.3d at 238; *Frank,* 951 F.2d at 323; (6) whether the defendant is prejudiced by allowing the plaintiff to press his claims anonymously, whether the nature of that prejudice (if any) differs at any particular stage of the litigation, and whether any prejudice can be mitigated by the district court, *see Advanced Textile Corp.,* 214 F.3d at 1068; (7) whether the plaintiff's identity has thus far been kept confidential, *see Del Rio,* 241 F.R.D. at 157; (8) whether the public's interest in the litigation is furthered by requiring the plaintiff to disclose his identity, *see Advanced Textile Corp.,* 214 F.3d at 1068; (9) "whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities," *Del Rio,* 241 F.R.D. at 157; and (10) whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff, *cf. Aware Woman Ctr.,* 253 F.3d at 687.

Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 188-90 (2d Cir. 2008).

In the present case, it is presumed Plaintiff will argue disclosure of his identity in the context of the criminal activity for which he was investigated by the Minot Defendants would subject him to harm. As discussed below, there are several problems with such an argument.

First, in requesting anonymity in this civil action, Plaintiff is essentially arguing the fact he was the subject of a criminal investigation is a private matter which should not be disclosed. Counsel for Minot Defendants have not located any law to support such a position. Such a position also defies logic, for if it were true, law enforcement would not be permitted to disclose the identity of individuals being investigated, or the nature of the crime being investigated, to witnesses or suspects. Law enforcement officers are permitted to question witnesses and suspects and to follow leads in investigating suspected criminal activity.

Second, Plaintiff's real identity in the context of the criminal investigation at issue is already public knowledge – confidentiality is not realistically possible. In the prior State Court civil action in which Plaintiff alleged identical facts and causes of action against the Minot Defendants, Judge Gary H. Lee's *Order* dated July 22, 2014 denying Plaintiff's request to utilize a pseudonym in the State Court action, identifies the Plaintiff by his real name. This is a publicly available document. In addition, the search warrants at issue in this case are publicly available documents, including the Search Warrant issued by Judge Douglas Mattson dated May 6, 2014 which specifically identifies the real name of the Plaintiff in authorizing a search of his automobile for the contraband at issue. Plaintiff's identity in relation to the events at issue in this case is already publicly available. As a result, permitting Plaintiff to utilize a pseudonym in this action would serve no useful purpose.

Third, as alleged by Plaintiff, no contraband was ultimately found in the possession of Plaintiff in relation to the investigation at issue in this case. Plaintiff's claims are all premised upon his purported innocence in relation to the criminal activity for which the investigation was conducted. Query how Plaintiff would be harmed by identifying himself in this civil action when Plaintiff's claims in this action constitute a proclamation of innocence. Plaintiff's claims in this action do not pertain to any highly sensitive matter of a personal nature peculiar to Plaintiff. Plaintiff is an adult male who was simply investigated for suspected criminal activity – a daily occurrence in the United States. This case does not involve the protection of the interests of a minor, or possible revelation of any stigmatizing medical condition or private personal characteristic of the Plaintiff.

Fourth, as discussed in *Sealed Plaintiff v. Sealed Defendant*, above, the public has a strong interest in knowing who is utilizing the courts, and in scrutinizing judicial proceedings, which should not be lightly set aside. There is simply no compelling reason to permit Plaintiff to prosecute this action under a pseudonym.

Although Plaintiff alleges he lost his employment and his tenancy where he lived as a result of the criminal investigation at issue, such allegations pertain to past events. It is not reasonable to assume Plaintiff will suffer similar consequences if he identifies himself in this action which seeks a remedy for the alleged wrongful handling of the investigation which did not find criminal contraband in the possession of Plaintiff, or result in any criminal charge against Plaintiff. The events at issue also occurred roughly eight months ago with no subsequent arrest of Plaintiff in relation to the investigation. The implication of innocence on the part of Plaintiff as a result of no subsequent charges against him being brought also mitigates against any assertion of harm through disclosure of his identity in this action.

For the above reasons, Plaintiff should not be permitted to utilize a pseudonym for purposes of prosecuting his claims in this action. If Plaintiff refuses to prosecute this action in his real name, the Minot Defendants request the Court dismiss this action with prejudice.

IV. CONCLUSION

For the foregoing reasons, the Minot Defendants request Plaintiff's claims against them be in all things dismissed, with prejudice. In the alternative, the Court should require Plaintiff to prosecute this action under his real name.

Dated this 10th day of February, 2015.

SMITH BAKKE PORSBORG
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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2015, a true and correct copy of the foregoing **MEMORDANUM IN SUPPORT OF MINOT DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** was filed electronically with the Clerk of Court through ECF.

I further certify that a copy of the foregoing document and the Notice of Electronic Filing will be mailed by first class mail, postage paid, to the following non-ECF participants:

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I further certify that a copy of the foregoing document and the Notice of Electronic Filing will be mailed by first class mail, postage paid, to the following non-ECF participants:

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By: *s/Randall J. Bakke*
Randall J. Bakke

Brief-Mtn to Dismiss